Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KERNEY FLOWERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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July 6, 2000

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QUESTION PRESENTED

I.

Does this Court have jurisdiction to remand to the district court for dismissal of Petitioner's superseding indictment on the basis that there was a jurisdictional defect which prohibited the district court from continuing with the prosecution of Petitioner's criminal case?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are: (1) United States who was the Plaintiff in the district court criminal action, Respondent in the section 2255 proceedings, and Appellee in the Court of Appeals, and (2) Kerney Flowers who was the Defendant in the district court criminal action, Petitioner in the section 2255 proceedings, and Appellant in the Court of Appeals.

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NO.

In The
Supreme Court of the United States
October Term 2000

KERNEY FLOWERS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Kerney Flowers respectfully prays that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding denying Petitioner's first motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Certiorari is requested so that this Court may afford relief to Petitioner, who was indicted twice by a grand jury convened in violation of Petitioner's Fifth Amendment rights of Due

Process and Equal Protection, as well as prosecuted by a district court that was itself without subject matter jurisdiction in light of the defective grand jury indictments.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit (denying Petitioner's Petition for Rehearing En Banc) that gives rise to this Petition is not published and is reprinted at A1. The Opinion from the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court is reprinted at B1. The Order of the District Court Denying Motion to Dismiss Superseding Indictment and for Reconsideration is reprinted at C1.

JURISDICTION

The Order of the Sixth Circuit denying Petitioner's Petition for Rehearing En Banc was entered on or about April 6, 2000. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.3, Supreme Court Rules, this Petition for Certiorari has been filed within 90 days of the date of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

28 U.S.C. § 2255 provides, in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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Fed.R.Crim.P. 12(b) states in pertinent part:

> **(b) Pretrial Motions**. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (2) Defenses and objections based on defects in the indictment or information (other than it fails to show jurisdiction in the court or to charge an offense

which objections shall be noticed by the court at any time during the pendency of the proceedings); or

. . . .

STATEMENT OF THE CASE

Flowers was initially indicted on January 25, 1994 for his alleged involvement in a conspiracy to possess with the intent to distribute cocaine (Count I) and possession with intent to distribute cocaine, aiding and abetting (Count II). On May 25, 1994, the government filed a superseding indictment in which Flowers was charged in a third count as using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c).[1]

Prior to the indictments and prior to Flowers' arrest, the judges of the Eastern District of Michigan approved an illegal and unconstitutional Jury Selection Plan (hereafter "the Plan"), on February 3, 1992.[2] The purpose of the Plan was to select grand and petit juries at random from a fair cross-

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[1] The circumstances of Petitioner's arrest and conviction were addressed during Flowers direct appeal to the United States Court of Appeals for the Sixth Circuit and are summarized in *United States v. Flowers,* 85 F.3d 629, 1996 WL 262484 (6th Cir. 1996).

[2] In *United States v. Greene,* 971 F.Supp. 1117 (E.D. Mich. 1997), there is a lengthy discussion about the Plan and its implementation.

section of the community, and to assure that all citizens would have the opportunity to be considered for service on grand and petit juries. The Plan's purpose was to also implement section 1862 of the Jury Selection and Service Act ("JSSA"), 28 U.S.C. § 1861 *et seq.*[3]

Section VIII.B. of the Plan called for a "subtraction method" of balancing the jury wheel to ensure that different groups in the community were represented to a degree and level of their percentages in the general population. In order for the district court for the Eastern District of Michigan to achieve such a "balance" of the different community groups, Section VIII.B. permitted the chief judge of the Court to issue an order to the jury selection Clerk to strike certain names from the qualified jury wheel so that the potential jurors closely approximated the percentage of the population of each group in the area of each place of holding court.

On April 1, 1992, the Judicial Council of the United States Court of Appeals for the Sixth Circuit reviewed and approved the Plan in accordance with 28 U.S.C. § 1863(a). Thereafter, several administrative orders were issued by the district court to implement the Plan. These administrative orders resulted in the exclusion of non-African-Americans

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[3] 28 U.S.C. § 1862 provides that no citizen shall be excluded from service as a grand or petit juror on the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

from the jury wheel simply because of their racial make-up.[4] The net effect of these administrative orders was the engagement of purposeful *de jure* intentional discrimination by the district court for the Eastern District of Michigan during the period between February 3, 1992 (date when the Plan was first implemented) and February 23, 1998 (date when the Plan was found unconstitutional in *United States v. Ovalle,* 136 F.3d 1092 (6th Cir. 1998).[5]

At the time the *Ovalle* case was rendered, Flowers had a § 2255 Motion pending in the district court on other issues. After *Ovalle* was decided, Flowers filed a Supplemental Motion to Dismiss Superseding Indictment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, relying on *Ovalle*. The district court denied the Supplemental Motion on May 11, 1998 and Petitioner's request for a Certificate of

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[4] The rationale for the exclusion of whites and other non-African-Americans was to ensure that African-Americans were fairly represented in the qualified jury wheel.

[5] As Judge Rosen noted in *Greene, supra,* 971 F. Supp. at 1123, n. 6, the Plan was so invidious that until April, 1997, once a white person's name was removed, that person was never returned to the wheel. The Chief Judge for the Eastern District then issued Administrative Order No. 97-AO-019, implementing § VIII(B) of the Plan, and for the first time since first being implemented in 1992, ordered that "[t]he names of the 1462 jurors removed are to be retained for future use." *Id.*

Appealability on May 21, 1998. Flowers appealed to the Sixth Circuit. On September 28, 1998, Chief Judge Boyce Martin granted him a certificate of appealability as to the *Ovalle* issue only.[6]

In an opinion issued January 24, 2000, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. The appellate court erroneously concluded that the illegally constituted grand juries pursuant to the unconstitutional Plan in this case did not create a "jurisdictional" defect in Flowers' indictments. As such, the appellate court reasoned that Flowers waived the claim that he was indicted by the unconstitutionally convened grand juries since he did not raise it prior to his guilty plea. It is obvious from the Sixth Circuit's opinion that it missed the point of Petitioner's challenge. Petitioner is not challenging the racial composition of the grand juries that indicted him. Petitioner is stating that the illegal system created by the judges of the

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[6] As this Court knows, Title 28 U.S.C. § 2253 requires that, before a court of appeals may hear an appeal of a final order in a proceeding under section 2255, a circuit justice or judge must issue a certificate of appealability. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Obviously, Flowers made a substantial showing of the denial of a constitutional right and that is why the Chief Judge of the Sixth Circuit Court of Appeals issued a certificate of appealability.

Eastern District of Michigan in the selection of the grand juries prevented the assembly of a proper grand jury. In the absence of a proper grand jury to vote on the substance of the charges, Petitioner's indictments had a jurisdictional defect.

Following the Sixth Circuit's opinion, Petitioner filed a Petition for Rehearing En Banc. In the Petition for Rehearing, Flowers challenged the Sixth Circuit's Opinion denying his section 2255 motion on the basis that the Opinion was contrary and in conflict with decision of this Court as well as other Circuits. Flowers pointed out that the indictments contained a jurisdictional defect since they were issued by grand juries that had been illegally convened under a discriminatory court-created Jury Selection Plan. The Petition was denied on April 6, 2000.

REASONS FOR GRANTING THE PETITION

Petitioner is seeking to set aside a conviction that was obtained in violation of Petitioner's Fifth Amendment rights and which contained a jurisdictional defect. The starting point of analysis in this case is that the Plan that was created and adopted by the judges of the Eastern District and approved by the Sixth Circuit's Judicial Council was illegal and unconstitutional from its inception. *See Ovalle*. That type of illegal Plan and system for selection of potential grand and petit juries prohibited from the very beginning of the

selection process the selection and empaneling of any valid grand or petit jurors. Indictments that were issued by grand juries convened under the illegal Plan were void *ab initio* and left the District Court without subject matter jurisdiction.

The Sixth Circuit's Opinion to the contrary is in direct conflict with this Court's decision in *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). In *Ex Parte Bain,* this Court made clear that an indictment is an **indispensable jurisdictional ingredient** of the court's power to try a defendant. The requirement of prosecution by indictment is included as a personal right in the Fifth Amendment to protect a presumably innocent defendant.[7] Absent a valid indictment, a district court simply lacks the power and authority to prosecute the accused.

An indictment protects the Sixth Amendment right that an accused "be informed of the nature and cause of the accusation." *See Russell v. United States,* 369 U.S. 749, 761, 82 S.Ct. 1038, 1045, 8 L.Ed.2d 240 (1962). When a legally

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[7] The historical basis for this right arose during the seventeenth century when the English Crown Prosecutor had tremendous power in a criminal case while the accused had very few rights and protections. As a result, the Founding Fathers insisted that the grand jury be interposed between the government as accuser and the citizen as the accused to serve as a necessary shield for the citizen. *See United States v. Calandra*, 414 U.S. 338, 342-43, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974).

constituted grand jury --the neutral buffer between the government and the accused-- is absent, the accused's Fifth and Sixth Amendment rights may easily be eviscerated. *Id.*

In *Campbell v. Louisiana,* 523 U.S. 392, 118 S.Ct. 1419, 1423, 140 L.Ed.3d 551 (1998), citing *Rose v. Mitchell,* 443 U.S. 545, 546, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), this Court stated that "[D]iscrimination on the basis of race in the selection of members of a grand jury . . . strikes at the fundamental values of our judicial system" because the grand jury is a central component of the criminal justice process. The Fifth Amendment requires the Federal Government to use a grand jury to initiate a prosecution, and 22 States adopt a similar rule as a mattter of state law. *Id.* This Court further stated that the grand jury, like the petit jury, "acts as a vital check against the wrongful exercise of power by the State and its prosecutors." It controls not only the initial decision whether to indict, but also significant decisions such as how many counts to charge and whether to charge lesser or greater offenses, including the important decision whether to charge a capital crime. **"The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions."** (Emphasis added). *See Rose, supra,* 443 U.S. 555-556 ("Selection of members of a grand jury because they are of one race and not another destroys the

appearance of justice and thereby casts doubt on the integrity of the judicial process").

It can hardly be disputed that in this case, the integrity of the judicial process is certainly in doubt when the very institution designed to protect Constitutional rights is in the business of violating them. Not only did the integrity of the judicial process suffer, but this type of selection system also created a jurisdictional defect in Flowers' indictments since they were not voted upon by legally constituted grand juries.

For example, in *United States v. Macklin,* 523 F.2d 193, 195 (2d Cir. 1975), the Court held that the **lack of a proper grand jury is not merely a defect in the institution of the prosecution, which must be raised only by motion before trial per Rule 12(b)(2).** Instead, the Second Circuit held that this type of defect also left the court without jurisdiction. The *Macklin* holding was premised on the theory that a properly constituted grand jury did not vote on the substance of the charges.[8]

In this case, there was never a properly constituted grand jury because of the unconstitutional Plan that was in effect. The absence of a legally constituted grand jury created a jurisdictional defect in Flowers's indictments. The Sixth

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[8] In *Macklin,* the indictment was handed down after the life of the grand jury had expired and therefore, it was a nullity, despite the entry of a plea of guilty by defendant Macklin.

Circuit's conclusion that there was no jurisdictional defect in this case is contrary to constitutional and case law. There is simply no distinction between the illegally constituted grand juries in *Macklin* and in this case. Both grand juries were improperly convened. In *Macklin*, the jurisdictional defect resulted from a grand jury whose term had expired. In this case, the jurisdictional defect resulted from the illegal system for the selection of grand and petit juries that was created by the judges of the Eastern District of Michigan and sanctioned by the Sixth Circuit.[9]

Furthermore, and contrary to the Sixth Circuit's opinion that this type of defect is waived unless raised prior to the plea, is simply not the state of the law. In *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999) and *Kelly v. United*

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[9] Not only did the Sixth Circuit approve the illegal Plan, but when challenged, has refused to offer anyone any relief. Instead, the Court has simply used procedural roadblocks to deny criminal defendants the Due Process that is guaranteed in the Fifth Amendment. To date, only the defendants in *Ovalle, supra* have been afforded relief. This Court should not permit this jurisdictional defect to go uncorrected solely on the basis of a procedural rule. Indeed, this Court has suggested that any narrowing of the opportunities to obtain collateral relief is itself an unconstitutional suspension of the writ of habeas corpus. U.S. Const., Art. I, § 9, cl. 2; *Sanders v. United States*, 373 U.S. 1, 11-12, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

States, 29 F.3d 1107 (7th Cir. 1994), it was held that a jurisdictional defect is never waivable and subject to a procedural default even if there is a guilty plea. Such a defect may be raised at any time. In fact, the original purpose of a writ of habeas corpus (such as in this case) was to allow relief where a defendant was convicted by a court that lacked jurisdiction in the first instance. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938).

This Court has repeatedly held that a plea may be collaterally attacked if the challenge is to the court's power to enter the conviction and impose the sentence. *See United States v. Broce,* 488 U.S. 563, 574-576, 101 S.Ct. 757, 102 L.Ed.2d 927 (1989); *Blackledge v. Perry,* 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1973) (holding that a collateral attack may be made if the challenge is to the very power of the State to bring the defendant into court to answer the charge brought against him) and *Menna v. New York,* 423 U.S. 61, 62-63, n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (holding that counseled guilty pleas do not inevitably "waive" all antecedent constitutional violations which are not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilty is validly established).

The illegal Plan prohibited the assembly of a proper grand jury. The non-existence of a properly constituted grand jury resulted in a jurisdictional defect which deprived the district

court of its power to act in this case. This defect was so fundamental since it constituted a structural defect (because it was court-created and approved by the Sixth Circuit's Judicial Council), that it caused the grand jury to no longer be a grand jury or the indictment to no longer be an indictment. *See Midland Asphalt Corp., v. United States,* 489 U.S. 794, 802, 114 S.Ct. 1996, 128 L.Ed.2d 849 (1989).[10]

Petitioner did not make a deliberate, informed choice to forego this type of challenge. Even if a challenge had been made prior to the plea, Flowers would not have received any relief. Therefore, the policy underlying Rule 12(b)(2) [to allow a district court to cure a deficiency in the proceedings before the process moves too far along], would not have been furthered because of the unique situation in this case. This was an illegal system that was judicially created and no judge in the Eastern District would have ruled contrary to the Plan, especially in light of the Sixth Circuit's approval of the Plan. In fact, one judge from the Sixth Circuit has acknowledged

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[10] In *Johnson v. Morgan,* 962 F.2d 1185 (6th Cir. 1992), it was recognized that if the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, prejudice to a defendant is presumed. In this case, the entire system for prosecuting criminal defendants in the Eastern District of Michigan was so compromised since there was illegal discrimination by the very court that is supposed to be the enforcer and guardian of the Constitution.

that no relief would have been afforded to anyone challenging the Plan because it was judicially created. *See United States v. Spearman,* 186 F.3d 743, 754 (6th Cir. 1999) (stating that defense lawyers did not challenge the illegal Plan before the district court judges since the judges were the creators of the Plan, and no relief would have been granted).

Assuming arguendo that Petitioner waived this challenge since it was not raised prior to his plea, nevertheless, he met the "cause and actual projudice" requirements of Rule 12(b)(2). The challenge was not raised prior to trial since it would have been an exercise in futility. The illegal system was created by the district court judges and approved by the Sixth Circuit's Judicial Council. Raising a challenge to the Plan before any judge in the Eastern District would not have resulted in any relief to the Petitioner.[11]

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[11] This Court has stated that futility is not cause for failure to object pre-trial. *See Engle v. Isaac,* 456 U.S. 107, 130, n. 35, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The principle was enunciated in the context of the policy disfavoring inferred waivers of constitutional rights where a defendant deliberately foregoes an objection to a **[curable trial defect]** (exmphasis added), even though he is aware of the factual and legal basis for an objection, simply because he thought the objection would be futile. In this case, Flowers did not deliberately forego this claim. An objection pre-trial before the very institution that created the illegal system

(continued...)

Petitioner has also shown prejudice.[12] Even if actual prejudice is required in this context, Petitioner has met this requirement. Flowers was indicted by a grand jury that was selected in violation of the Fifth Amendment to the United States Constitution. The very integrity of the judicial process was called into question because of the illegal Plan that was in place in the Eastern District. Since there was *de jure* discrimination on the basis of race in the selection of grand jurors, the entire judicial process was undermined and suspect and therefore, the prejudice is obvious.

The Eastern District of Michigan was engaged in purposeful racial discrimination. Potential grand and petit jurors were not permitted to come to the courthouse for service simply because of their race. This Court is empowered to remedy this fundamental injustice. It is quite an anomaly for a federal court system to engage in purposeful discrimination and then to deprive criminal defendants of any relief. This type of illegal system smacks of the days of

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[11](...continued)
would not have resulted in a curing of this defect.

[12] Actual prejudice need not be shown since prejudice is presumed in this context. As this Court held in *Vazquez v. Hillery,* 474 U.S. 254, 263-264, 106 S.Ct. 617, 88 L.Ed.2d 598 (1985), discrimination in the grand jury undermines the **structural integrity of the criminal tribunal itself**, and is not amenable to harmless-error review. (Emphasis added).

Plessy v. Ferguson, 163 U.S. 557, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).[13]

CONCLUSION

For the foregoing reasons, this Court should grant this Petition and issue a writ of certiorari remanding to the District Court for an Order dismissing the Petitioner's superseding indictment.

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Dated: July 6, 2000

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[13] Petitioner is only seeking a fair and constitutional process during his criminal proceedings. A reversal in this case would not necessarily release Petitioner from having to face charges. It would only ensure that Flowers will be indicted by a constitutionally firm grand jury. This Court should not be concerned with a "floodgates" argument (as was the Sixth Circuit). A floodgates argument can be made in every case issued by this Court. If that was the litmus test, this Court would be hesitant in all cases where many defendants can benefit from its decisions, and deny relief on that basis.

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EASTERN DISTRICT OF MICHIGAN FILINGS:

Order Denying Motion to Dismiss
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER, FILED APRIL 6, 2000

98-1690

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KERNEY FLOWERS,	)	
Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA,	)	
Respondent-Appellee.	)	
	)	

BEFORE: JONES, BOGGS, and COLE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/s Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OPINION, FILED JANUARY 24, 2000

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

98-1690

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KERNEY FLOWERS,	)	
Petitioner-Appellant,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Respondent-Appellee.	)	
	)	OPINION

BEFORE: JONES, BOGGS, and COLE, Circuit Judges

R. GUY COLE, JR., Circuit Judge. Petitioner-Appellant Kerney Flowers ("Flowers") appeals the district court's decision denying his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. This court granted Flowers a certificate of appealability on one issue only: whether the indictment of Flowers by a grand jury convened under a plan later found to be constitutionally and statutorily invalid by this court in *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), must be dismissed, along with Flowers's conviction and sentence, even though Flowers failed to object to the grand jury before entering a guilty plea and upon direct appeal.

For the reasons discussed below, we AFFIRM the judgment of the district court.

I.

On January 25, 1994, Flowers was indicted on two counts: conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1).[1] Flowers was arraigned on February 18, 1994, and entered a plea of not guilty. Flowers was represented by counsel, Cornelius Pitts, at this time. On May 25, 1994, the government filed a superseding indictment against Flowers which added a third count, that of using and carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c).

On August 9, 1994, Flowers again entered a plea of not guilty. A jury was impaneled and sworn that same day. Flowers and the government entered into a plea agreement in which Flowers agreed to plead guilty to conspiracy to possess cocaine with intent to distribute in exchange for the government dropping the second and third counts. *See Flowers*, 1996 WL 262484, at **1. On August 10, 1994, Flowers withdrew his plea of not guilty and entered a plea

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[1]We have previously addressed the circumstances of Flowers's arrest and conviction in considering his direct appeal. *See United States v. Flowers*, 85 F.3d 629, 1996 WL 262484 (6th Cir. May 15, 1996).

of guilty to the first count of the superseding indictment. Later that day, Flowers was released on an electronic "tether" and ordered to surrender himself to marshals twenty-one days later. Flowers failed to report on the appointed day and was eventually arrested on October 27, 1994.

In December 1994, Cornelius Pitts withdrew as Flowers's attorney. On January 19, 1995, S. Allen Early, III filed an appearance on behalf of Flowers. Flowers's new attorney immediately moved to vacate Flowers's plea agreement and moved to change venue. The court denied both of these motions on March 16, 1995. On April 10, 1995, the court entered judgment against Flowers and sentenced him for conspiracy to possess with intent to distribute and to distribute cocaine.

On April 20, 1995, Flowers appealed his conviction, sentence, and the district court's denial of his motion to withdraw his guilty plea. In his appeal, Flowers made no mention of any defect in the grand jury that indicted him. On May 15, 1996, this court issued an unpublished opinion upholding Flowers's conviction and sentence, and affirming the district court's denial of his motion to withdraw his guilty plea. *See Flowers*, 1996 WL 262484. In our ruling, we rejected Flowers's theory that he should be allowed to withdraw his guilty plea because Pitts had provided ineffective assistance of counsel. *Id.* at **2.

On May 14, 1997, Flowers moved in the district court to vacate his sentence pursuant to 28 U.S.C. § 2255, raising various issues. In his § 2255 motion, Flowers did not object to the composition of the grand jury that dad indicted him on June 4, 1997, the district judge order the government to respond to Flowers's motion to vacate his sentence; the government apparently failed to respond to the order and Flowers filed a motion for judgment on the pleadings on December 12, 1997. On February 4, 1998, the court dismissed Flowers's motion for judgment on the pleadings, and, after hearing argument regarding the substance of his § 2255 claim, the court orally denied Flowers's motion.

On February 23, 1998, this court decided *Ovalle*. In *Ovalle*, we held that the jury selection plan for the Eastern District of Michigan violated both the Jury Selection and Service Act, 28 U.S.C. §§ 1861 et seq., and the Fifth Amendment because it removed potential jurors from jury service on the sole basis of their race. *See Ovalle*, 136 F. 3d at 1109. One month after our decision in *Ovalle*, on March 24, 1998, Flowers submitted a motion to dismiss the superseding indictment. In the motion, Flowers for the first time challenged his conviction, sentence, and indictment on the basis that he was indicted by a grand jury chosen through the jury selection plan found to be statutorily and constitutionally defective in *Ovalle*. On March 25, 1998, the district court filed its written denial of Flowers's §

2255 motion. The court did not address the *Ovalle* issue Flowers had raised in his March 24 motion to dismiss the superseding indictment.

On March 30, 1998, Flowers moved for reconsideration of his § 2255 motion.[2] Arguing that the court's March 25 ruling did not address the *Ovalle* issue, he sought a ruling on that claim. On May 11, 1998, the court denied Flowers's motion for reconsideration of his § 2255 motion and his motion to dismiss the superseding indictment. The court rejected Flowers's *Ovalle* claim, finding that Flowers's challenge to his conviction "based on constitutional infirmities in the Jury Selection Plan comes much too late."[3] The court reasoned that the jury plan struck down in *Ovalle* had been part of the public record for long enough that Flowers should have challenged it much earlier in the proceedings. Flowers followed with a

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[2] In the motion for reconsideration, Flowers referred to the March 24 motion to dismiss the superseding indictment as a supplement to his earlier habeas petition. For purposes of this appeal, we construe the March 24 motion to dismiss as a supplement to Flowers's § 2255 motion.

[3]The court also noted that Flowers's claim under *Ovalle* was premature because, even though the Sixth Circuit had decided the case, the mandate had not yet issued. Because we find that Flowers waived his objection to the composition of the grand jury by pleading guilty, we need not reach this issue.

petition for a certificate of appealability on May 19, 1998, *see* 28 U.S.C. § 2253,[4] seeking to raise the issues from his original § 2255 motion as well as the *Ovalle* issue. Citing 28 U.S.C. § 2253(c)(2) and finding that Flowers had set forth "no grounds for appeal," the district court denied Flowers's petition on May 28, 1998.

On June 2, 1998, Flowers appealed the denial of his petition. On September 28, 1998, this court entered an order permitting Flowers's appeal solely on the *Ovalle* issue. See 28 U.S.C. § 2253(c)(2).

II.

In reviewing the district court's denial of a 28 U.S.C. § 2255 motion, this court reviews the district court's legal findings de novo and its findings of fact for clear error. *Hilliard v. United States*, 157 F.3d 444, 447 (6th Cir. 1998). For a federal prisoner to prevail on a § 2255 claim, he must show that:

> the judgment was rendered without jurisdiction, or that the sentence imposed

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[4]Title 28 U.S.C. § 2253 requires that, before a court of appeals may hear an appeal of a final order in a proceeding under § 2255, a circuit justice or judge must issue a certificate of appealability. 28 U.S.C. § 2253. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

> was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack ....

28 U.S.C. § 2255. To prevail on a § 2255 motion alleging constitutional error, Flowers must establish an error of constitutional magnitude which has had a substantial and injurious effect or influence on the proceedings. *See Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)). To prevail on a § 2255 motion alleging non-constitutional error, Flowers must show a "fundamental defect which inherently results in a complete miscarriage of justice, or, an error so egregious that it amounts to a violation of due process." *Watson*, 165 F.3d at 488 (citation and internal quotations omitted). For the reasons that follow, Flowers can show neither constitutional nor non-constitutional error warranting relief.

III.

Flowers seeks to vacate his sentence on the basis that the grand jury that indicted him was found to be constitutionally invalid by this court in *Ovalle*. It is true that Flowers was indicted by a grand jury that had been convened under the jury selection plan that we struck down

in *Ovalle*. *See Ovalle*, 136 F,3d at 1095-98 (describing plan). However, Flowers's failure to object to the plan before entering his guilty plea is fatal to his claim. In *Tollett v. Henderson*, 411 U.S. 258 (1973), the Supreme Court rejected a defendant's claim of constitutional discrimination in the selection of grand jurors that the defendant raised for the first time after he had pleaded guilty. The Court stated the familiar rule that a guilty plea made on the advice of competent counsel results in waiver of constitutional claims:

> If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' ... [C]laims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, [but] they are not themselves independent grounds for collateral relief.

Tollett, 411 U.S. at 266-67 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The *Tollett* Court emphasized that a criminal defendant who has pleaded guilty on the advice of counsel waives any non-jurisdictional, constitutional challenge he might have and may attack only the nature of his plea:

> [A] guilty plea represents a break in the chain of events which has preceded it in the

> criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Tollett, 411 U.S. at 267. The Court has reiterated the principle set forth in *Tollett* on several occasions. *See, e.g., United States v. Broce*, 488 U.S. 563, 569 (1989) ("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary."); *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) (citing *Tollett* and other cases) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."); *cf. Bousley v. United States*, 523 U.S. 614, --, 118 S. Ct. 1604, 1611 (1998) (defendant who has procedurally defaulted a claim by failing to raise it on direct review may raise claim

in habeas proceeding only if he can demonstrate cause and actual prejudice or actual innocence).

Under the standard set forth in *Tollett* and subsequent cases, Flowers's appeal has no merit. He can hardly claim that his attorney's advice to plead guilty entitles him to relief: this court has already found, on direct appeal, that Flowers "had able assistance of counsel and knowingly entered the conditional plea agreement eventually accepted by the district court." *Flowers*, 1996 WL 262484, at **2. Flowers's guilty plea waived any objections to the grand jury he might haver raised.

Flowers argues that *Tollett* does not apply to his case. Rather, he challenges the very jurisdiction of the district court to hear his case. Because the indictments against him were returned from a constitutionally infirm grand jury, Flowers argues, they were invalid; without a valid indictment, the court never had jurisdiction to hear his case. Further, Flowers claims, because the grand jury was selected from a plan that was approved by the very court which heard his case, *see Ovalle*, 136 F.3d at 1095 (describing approval of jury selection plan by judges of the United States District Court for the Eastern District of Michigan), it would have been futile for him to challenge the plan in the district court. These arguments fail.

First, defects in the grand jury are distinct from jurisdictional defects. Fed. R. Crim. P.12(b) makes that clear, by providing that challenges to the grand jury must be

raised prior to trial, and distinguishing such challenges from attacks on a court's jurisdiction, which may be raised at any time. *See* Fed. R. Crim. P. 12(b) and advisory committee notes;[5] Rule 12(f); *see also United States v. Davis*, 411 U.S. 233 (1973) (untimely allegations of discrimination in a grand jury may be waived if not raised prior to trial).[6]

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[5]The advisory committee notes further emphasize that challenges to the grand jury are distinct from challenges to the court's jurisdiction by including "[i]llegal selection or organization of the grand jury" within the category of "defects in the institution of the prosecution or in the indictment or information," and contrasting them with "lack of jurisdiction or failure to state an offense...." See Fed. R. Crim P. 12(b) advisory committee notes.

[6]A defendant may escape waiver under Rule 12 only if he is able to show cause and actual prejudice. *See* Fed. R. Crim. P. 12(f); *Ovalle*, 136 F.3d at 1107. Although Flowers's waiver of his right to object to the grand jury by virtue of his guilty plea relieves us of the need to analyze his case under Rule 12, Flowers's claim would fail even under Rule 12(b)(2) and 12(f) because he is unable to show cause and actual prejudice for his failure to object to the grand jury indictment prior to trial. *See United States v. Garavaglia*, 178 F.3d 1297,1999 WL 220125, at **6 (6th Cir. Apr. 6, 1999) (fact that "case law was against [defendant]" does not constitute cause and actual prejudice regarding failure to raise *Ovalle* objection to grand jury system prior to guilty plea). *See also Ovalle*, 136 F.3d at 1108 (Fed. R. Crim. P. 12(b)(2) and 12(f) generally proscribe defendant's objection on appeal to selection of

Further, Flowers's arguments all depend heavily on his claim that if he had challenged the grand jury that indicted him, the challenge would have been futile because no district court judge would have granted a motion challenging a jury selection plan that he himself had implicitly approved by being of member of the district court. *See Ovalle*, 136 F.3d at 1095. Flowers's reasoning is not persuasive. It is the very nature of our judicial system to evolve by analyzing challenges, even those brought against the system itself. Indeed, the jury selection system to which Flowers objects was found to be unconstitutional and altered because the defendants in *Ovalle* challenged it on direct appeal. *See id.* at 1109. Further, the Supreme Court has held repeatedly that "'futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time."' *Bousley*, 523 U.S. at --, 118 S. Ct. at 1611 (1998) (internal quotation omitted) (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)). Thus, Flowers's attempt to excuse his failure to challenge the grand jury before pleading guilty must fail.

Tollett is directly on point: Flowers's failure to challenge his indictment prior to pleading guilty is fatal to

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grand and petit juries); *id.* at 1108 n.17 (listing cases supporting "rule of long standing of this court that we will not reverse on grounds not raised in the trial court.").

his current § 2255 claim. *See United States v. Valentin*, 1999 WL 644381, at *1 (6th Cir. Aug. 17, 1999) (citing *Tollett*, 411 U.S. at 267) (defendant's guilty plea waives non-jurisdictional defects in pre-plea proceedings); *Killingbeck v. United States*, 173 F.3d 429, 1999 WL 96653, at **2 (6th Cir. Feb. 5, 1999) (citing *Ovalle*, 136 F.3d at 1108-09) (failure to object to composition of grand jury before pleading guilty results in waiver of *Ovalle* challenge); *Lane v. United States*, 65 F. Supp. 2d 587, 590 (E.D. Mich. 1999)) (citing *Tollett*, 411 U.S. at 266) (entry of guilty plea forecloses *Ovalle* challenge to constitutionality of grand jury selection procedure); *see also United States v. Maliszewski*, 161 F.3d 992, 1015 (6th Cir. 1998) (failure to raise *Ovalle* challenge in district court is fatal to claim on direct appeal), *cert. denied, Villareal v. United States*, 119 S. Ct. 1126 (1999) and *Maliszewski v. United States*, 119 S. Ct. 1126 (1999); *In re Gray*, 163 F.3d 394 (6th Cir. 1998) ("[N]o court has made *Ovalle* applicable retroactively to cases on collateral review ...."). Accordingly, the district court did not err in denying Flowers's § 2255 claim.

IV.

For the foregoing reasons, we **AFFIRM** the judgment of the district court denying Flowers's § 255 claim.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
ORDER, FILED MAY 11, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KERNEY FLOWERS,
Petitioner,

v. Civil No. 97-72290

UNITED STATES OF AMERICA, Criminal No. 94-90003
Respondent.

_____/

ORDER

This is a habeas corpus case. Petitioner is challenging his conviction on a plea of guilty to a violation of 21 U.S.C. § 846 and § 841(a) (1). Petitioner's conviction was affirmed on appeal. See United States v. Kerney Flowers, No. 95-1466, 1996 W.L. 262484 (6th Cir. May 15, 1996) (85 F.3d 629 (Table)). The petition was dismissed on March 25, 1998. See Order Dismissing Petition For Habeas Corpus and Judgment for Dismissal, each entered on March 25, 1998

Petitioner has moved for reconsideration and also moved to dismiss the superseding indictment. The government has responded. Petitioner relies on United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998), which

invalidated the Jury Selection Plan for this district. The mandate in Ovalle has not yet issued. Also, aside from the temporal and procedural deficiencies in petitioner's pending motions, the decision in Ovalle is not applicable to the circumstances of petitioner's superseding indictment and guilty plea. Petitioner's challenge to his conviction based on constitutional infirmities in the Jury Selection Plan comes much too late. The Jury Selection Plan since adoption and the periodic draws of qualified jury wheels have been part of the public record of the Eastern District. Petitioner's belated efforts to take advantage of the decision in Ovalle must be rejected.

The pending motions are DENIED.

SO ORDERED.

s/s Avern Cohn

Avern Cohn

United States District Judge

DATED: May 11, 1998

DETROIT, MICHIGAN